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No. 85-1924

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 340,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

The citations to the opinions below and the basis for this Court's jurisdiction are correctly set forth in petitioner's brief at p. 1. In addition to the statutory provision quoted in that brief, the following additional provisions of the National Labor Relations Act, as amended, 29 U.S.C. §§ 151 *et seq.*, are pertinent here:

Section 2, 29 U.S.C. § 152. Definitions

When used in this subchapter—

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained

any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

* * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 14(a), 29 U.S.C. § 164(a). Construction of Provisions

(a) Supervisors as union members

Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

STATEMENT OF FACTS

The International Brotherhood of Electrical Workers Local 340 ("Local 340" or "the Union"), represents electricians in an area that includes Sacramento, California. Pet. App. 2a, 11a-12a. For many years prior to 1981, Local 340 had negotiated a series of collective bargaining

agreements with the Sacramento Chapter of the National Electrical Contractors Association, Inc. (NECA), a multi-employer bargaining unit. (*Id.*) Harold E. Nutter, Inc. ("Nutter") and Royal Electric Co. ("Royal"), electrical contractors in Sacramento, were represented by NECA. *Id.*

In September, 1981, in the course of a labor dispute between NECA and Local 340, the Union disclaimed interest in representing the employees of NECA members in "the multi-[employer] bargaining unit previously established." Pet. App. 2a, 12-13a. The following day, NECA adopted the disclaimer, causing the multi-employer unit to be "dissolved" (as the Board has found in a related case, *Arden Electric*, 275 NLRB No. 95 (June 4, 1985)). Shortly thereafter, the Union filed separate representation petitions seeking to represent, in single-employer units, the employees of those employers that had been in the NECA bargaining unit and whose employees the Union believed desired representation by Local 340. J.A. 126. Local 340 did not then or subsequently file petitions to represent the employees of Royal or Nutter, and since September, 1981, Local 340 has played no part in negotiating the terms and conditions of employment for employees of those two employers. Pet. App. 2a, 12a-13a; J.A. 55-57, 77-79.

On October 1, 1981, NECA signed a labor agreement with an "independent" union, the National Association of Independent Unions, Pet. App. 2a, 13a, which operated, at least in part, out of the same building as NECA, J.A. 59. Both Nutter and Royal immediately adopted that contract, Pet. App. 2a, 13a, which provided for electricians to be paid wages below the level established in Local 340's collective bargaining agreements with other employers. J.A. 82, 136.

Under the Constitution of the International Brotherhood of Electrical Workers ("IBEW"), the international union which is the parent of Local 340, IBEW members

are not to "work[] for, or on behalf of, any employer . . . whose position is adverse or detrimental to the IBEW." J.A. 152. By paying wages below union scale, Royal and Nutter assumed a position "adverse or detrimental to the IBEW"; indeed, some time after January 1982, Local 340 picketed one of Nutter's jobsites for several days because Nutter was undermining the union's scale by paying sub-standard wages. J.A. 72, 79. The picketing was "normal area standards picketing." J.A. 133, 136.

In March, 1982, a member of Local 340 filed a charge with the Local against a fellow member, Marvin Miller, alleging that Miller was working for Nutter. On November 1, 1982, the Local's business manager filed a similar charge against union member Ted Choate. And on December 20, 1982, a third union member filed a charge against Albert Schoux, a member of a sister local of the Union, alleging that Schoux was working for Royal, another employer with which the Union did not have a bargaining relationship. Pet. App. 2a-3a, 14a, 17a-18a, 20a-22a.

Following notices to Miller, Choate and Schoux, trial boards established by the Union held a hearing in each case. Based on the evidence presented at these hearings, the trial boards found the individuals in question guilty, *inter alia*, of violating the constitutional prohibition on working for adverse employers. A fine was imposed on each individual. Pet. App 2a-3a, 18a, 21a, 22a.

After the fines were assessed, Nutter and Royal filed unfair labor practice charges against Local 340, alleging that by fining individuals who worked for those employers, the Union had restrained or coerced the employers in the selection of their representatives in violation of § 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(B) ("NLRA" or "the Act"). An Administrative Law Judge of the National Labor Relations Board ("NLRB" or "the Board") found the fines of Choate and Schoux to be unlawful on the theory that those fines would have " 'the reasonably forseeable and

intended effect' " of causing those individuals to resign their supervisory posts. Pet. App. 27a. The ALJ sustained the fine of Miller, however, because, although Miller ordinarily served as one of Nutter's foremen, Miller worked as a journeyman electrician on the particular job at which Miller had been seen working by a fellow union member and for which Miller was fined. The ALJ concluded that disciplining Miller for working on that job did not "restrain or coerce Nutter Electric in its selection or retention of supervisors." Pet. App. 29a.

All parties filed exceptions to the ALJ's decision. On August 14, 1984, the Board, without opinion, "affirm[ed] the judge's rulings, findings conclusions." Pet. App. 9a.

The Board petitioned the United States Court of Appeals for the Ninth Circuit to enforce its order. On January 22, 1986, that court denied enforcement, ruling that because Local 340 did not have a collective bargaining relationship with Royal or Nutter and was not seeking to organize those employers' employees, the Local's conduct in fining union members for working for those employers "cannot reasonably be construed as an effort to restrain or coerce the employers." Pet. App. 7a.

On October 6, 1986, this Court granted the Board's petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The theory on which the Board's decision in this case rests is that § 8(b)(1)(B) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(1)(B), not only prohibits a union from disciplining a union member who serves as a management representative for the individual's conduct *qua* management representative but also prohibits union discipline whose purpose and effect is to discourage union members from accepting management positions. The implications of this theory are far-reaching. As the instant case illustrates, the Board's understanding of § 8(b)(1)(B) prohibits a union from en-

forcing as against supervisor-members union rules requiring members to work only for employers who pay the union's collectively negotiated wage scale. And the logic of the Board's theory would make it equally unlawful for a union to limit its membership to rank-and-file workers and to exclude all supervisors from membership. PP. 7-12 *infra*.

The Board bases its theory almost entirely on this Court's decision in *American Broadcasting Cos. v. Writers Guild*, 437 U.S. 411 (1978) ("*ABC*"). There is language in that case which can be read to establish an independent rule that any union discipline which affects union members' "willingness to serve" as management's representatives violates § 8(b)(1)(B). But that language was written in a case in which a union, having allowed its members to assume a supervisory status, sought to use the supervisors' union membership as a handle to control the supervisors' conduct as management's representative. Against that background *ABC*, fairly read, goes no further than to suggest that § 8(b)(1)(B) proscribes union action which interferes with the employer's control over his representative and *thereby* affects the representative's "willingness to serve." The NLRB itself has so understood *ABC* in some of its decisions. Pp. 12-17 *infra*.

The legislative history of the statute leaves no doubt that the narrower reading of *ABC* better reflects Congress' intent. Although Congress did not focus specifically on and reject in terms the theory the Board here seeks to extract from *ABC*, the legislative materials make clear that § 8(b)(1)(B) was intended, understood, and defended as a narrow prohibition addressing precisely defined evils far removed from the type of union conduct at issue here. Indeed, as we show, by a full review of the 1947 Congress' actions and deliberations in amending the labor law, the Board's attempt to stretch § 8(b)(1)(B) to cover the instant case ignores the political context in which that section was enacted, and the "gamut of values current" at that time. PP. 18-36 *infra*.

ARGUMENT

SECTION 8(b)(1)(B) OF THE NLRA DOES NOT PROHIBIT A UNION FROM DISCIPLINING A UNION MEMBER FOR TAKING A SUPERVISORY POSITION IN VIOLATION OF THE UNION'S CONSTITUTION

A. Threshold Considerations

The Constitution of the International Brotherhood of Electrical Workers—like that of many other unions, *see* n.3 *infra*—has for many years, prohibited members of the Union from "working for, or on behalf of, any employer . . . whose position is adverse or detrimental to the IBEW." In the instant case, the Union sought to enforce that rule by disciplining three members who had accepted jobs with non-union employers.[1] The Board here contends that although the Union is free to discipline the one member who accepted a non-supervisory job, § 8(b)(1)(B) of the NLRA makes it unlawful for the Union to discipline the two members who happened to accept supervisory positions with grievance adjustment responsibilities.

In making that argument the Board does not contend that the Union in this case placed economic pressure on the employers in an effort "to dictate . . . who would represent them in collective bargaining or grievance adjustment." *Florida Power & Light Co. v. Electrical Workers*, 417 U.S. 790, 803 (1974) ("*FP&L*"). Nor does the Board claim that the Union's conduct "would or might adversely affect the performance of the [supervisor-members'] grievance-adjustment duties" or "interfere with the employer's control over his representative." *American Broadcasting Cos. v. Writers Guild*, 437 U.S. 411, 432, 433 (1978) ("*ABC*"). Rather the Board's theory is that

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[1] We use the term "non-union employers" to refer to employers whose employees are unrepresented by any union and employers who do not have a collective-bargaining relationship with the union imposing the discipline.

the Union's action has "the reasonably foreseeable and intended effect" of reducing the supply of workers available for supervisory positions and in that sense "restrain[s] or coerce[s]" the employer in filling such positions. *See* Pet. App. 27a; NLRB Br. at 3-4, 13-14. It is our submission, *per contra*, that § 8(b)(1)(B) cannot be stretched so far as to prohibit all union conduct which affects the size of the pool from which an employer chooses his supervisors, especially union conduct aimed at preventing union members from working for an employer with whom the union does not have a collective bargaining relationship.[2]

1. It is helpful at the outset to observe the sweeping implications of the Board's theory. As this case makes clear, the Board's understanding of § 8(b)(1)(B), prohibits a union from enforcing as against supervisor-mem-

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[2] Unlike the court below, we do not believe that a union's right to discipline union members for accepting a supervisory position is limited to instances in which the member is working for an employer with whom the union does not have a bargaining relationship *and* as to whom the union has not engaged in "overt acts" manifesting the union's "desire to represent" the employees of that employer. *Compare* Pet. App. 7a.

We do agree with the view of the court of appeals that this case does not raise any issue concerning the application of § 8(b)(1)(B) with respect to union discipline of supervisor-members employed by employers with whom the union *does have* a collective-bargaining relationship. Indeed, all that is necessary to affirm the judgment of the court of appeals denying enforcement of the Board's order in the present case is a holding that whatever § 8(b)(1)(B)'s significance where a union and employer have a collective-bargaining relationship, the section does not prohibit a union from requiring its members to refrain from working for non-union employers. As we show below, the legislative history establishes at least this much.

For the reasons set forth *infra*, however, we suggest that the soundest basis for affirming the decision below is by distinguishing union discipline aimed at preventing union members from accepting management positions from union discipline aimed at controlling the manner in which union members represent management, and by holding the former to be outside the reach of § 8(b)(1)(B).

bers union rules requiring members to work only for employers paying the union's collectively-negotiated wage scale. Such rules were quite common at the time § 8(b)(1)(B) was enacted in 1947;[3] indeed, rules prohibiting

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[3] *See* International Brotherhood of Electrical Workers *Constitution*, Art. XVII § 12 p. 26 (1941) (non-signatory employers rule); Bricklayers, Masons and Plasterers International Union of America, *Constitution and Rules of Order*, Art. XVIII § 2 p. 77) (1946) (non-signatory employers rule); United Brotherhood of Carpenters and Joiners of America, *Constitution and Laws*, § (T) (p. 33) (1944) (non-signatory employers rule); International Union of Elevator Constructors, *Constitution and By-Laws*, Art. VIII § 6 (p. 19) (1946) (withdrawal penalties for members working for non-signatory employers in industry); International Association of Heat and Frost Insulators and Asbestos Workers, *Constitution and By-Laws*, Art. XV § 1 (p. 23) (withdrawal restrictions), Art. XV § 9 and § 11 (pp. 29-30) (union wage scale) (1942); International Union of Operating Engineers, *Constitution*, Art. XXIII, Subdiv. 3 (pp. 82-83) (non-signatory employer), Art. XV (p. 55) (withdrawal restrictions) (1944); Sheet Metal Workers International Association, *Constitution and Ritual*, Art. VII, §§ 2, 5 (pp. 25, 26) (1946) (union wage scale), § 19 (p. 31) (non-signatory employer), Art. XV, §§ 1, 2 (withdrawal restrictions) (1946); United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Association, *Constitution and By-Laws*, Art. II § 7 (p. 12) (union wage scale), Art. II § 18 (p. 14) (non-signatory employers), Art. IV § 4 (p. 26) (withdrawal restrictions) (1940); Brotherhood of Painters, Decoraters and Paperhangers of America, *Constitution* § 303 (p. 104) (non-signatory employer), § 304 (p. 104) (union wage scale) (1947); International Association of Bridge, Structural and Ornamental Iron Workers, *Constitution*, Art. XVII §§ 13, 14 (pp. 51-53) (withdrawal restrictions), Art. XVIII, § 7 (pp. 76-77) (union wage scale) (1944); Operative Plasterers' and Cement Finishers' International Association, *Constitution* §§ 158-60 (p. 56) (1948) (non-signatory employer); *see also* United Mine Workers of America, *Constitution of the International Union*, Art. XIV § 10 (p. 52) (1938) (working in non-union mine); United Stone and Allied Products Workers of America, *Constitution*, Art. XLIII § 1(f) (p. 76) (1946) (non-signatory employer); Oil Workers International Union, *Constitution and By-Laws*, Art. IV § (p. 61) (1946) (union wage scale); Amalgamated Clothing Workers of America, *Constitution*, Art. IX, § 8 (p. 21) (1948) (withdrawal restrictions); International Association of Machinists, *Constitution*

union members from working for non-union employers date from the beginnings of the labor movement in this country, and were long enforced at common law.[4] The nation's oldest national union, the International Typographical Union, adopted such a rule prior to 1885,[5] and the IBEW's very first constitution, adopted at its founding in 1891,[6] included a similar prohibition.

Such union rules further a vital union interest: the "elimination of . . . competition based on differences in labor standards." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 503 (1940). That "is the objective of any national labor organization," *id.*, and it is the predicate of the federal labor laws which embody a "strong labor policy favoring the association of employees to eliminate competition over wages and working conditions," *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 622 (1975). As this Court recognized long ago, to be "at all effective" in this endeavor

> employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the community united, because in the competition between employers, they are bound to be affected by the standard of wages of their trade in the neighborhood. [*American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921).]

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of the Grand Lodge, District and Local Lodges, Art. E § 1 (p. 75) and Art. I, § 1 (p. 82) (1946) (minimum union wage).

[4] *See, e.g., Schauten v. Alpine*, 215 N.Y. 225 (1915); *Meurer v. Detroit Musicians*, 95 Mich. 451 (1893); Summers, *Legal Limitations on Union Discipline*, 64 Harv.L.Rev., 1049, 1064 (1951).

[5] *See American Newspaper Publishers Ass'n v. NLRB*, 193 F.2d 782, 787-89 (7th Cir. 1951), *aff'd*, 345 U.S. 100 (1953); G. Fink, *Labor Unions*, 301 (1977).

[6] Constitution of the National Brotherhood of Electrical Workers of America, First Convention, Art. XIX § 9 (1891). *See* M. Mulcaire, *The International Brotherhood of Electrical Workers: A Study in Trade Union Structure and Function* 42 (1923).

It is for that reason that unions seek to organize as many workers as possible within an industry, and then seek to assure that union members work only for employers paying collectively-bargained wages. There can be no doubt that the understanding of § 8(b)(1)(B) that the Board champions here would significantly limit the ability of labor unions to achieve this central aim.

The logic of the Board's theory would, moreover, make it unlawful for a union to limit its membership to rank-and-file workers and to exclude *all* supervisors from union membership (regardless of where the supervisor works) as such a rule would have "the reasonably foreseeable and intended effect" of causing union members who desire to maintain their union membership not to accept supervisory positions. Yet, at the time § 8(b)(1)(B) was enacted, many unions, in an exercise of a core aspect of their associational freedom—the "freedom to identify the people who constitute the association and to limit the association to those people only," *Democratic Party v. Wisconsin*, 450 U.S. 107, 122 (1981)[7]—allowed only rank-and-file workers to maintain their membership and terminated the membership of those who accepted a supervisory post.[8] And at the same time § 8(b)(1)(B)

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[7] *See also Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (A "regulation that forces the group to accept members it does not desire" is a "clear[] example of an intrusion into the internal structure and affairs of an association").

[8] *See, e.g.*, United Automobile, Aircraft and Agricultural Implement Workers of America, *Constitution of the International Union*, Art. 6 § 10 (p. 10) (1946); United Mine Workers of America, *Constitution of the International Union*, Art. XIV § 2 (p. 48) (1938); Amalgamated Clothing Workers of America, *Constitution*, Art. IX § 1 (p. 19) (1948); United Stone & Allied Products Workers of America, *Constitution*, Art. X § 1(b) (p. 25) (1946); American Communications Association, *International Constitution*, Art. V §§ 1(a), 17 (1944); United Steelworkers of America, *Constitution of the International Union*, Art. III (p. 4) (1946); Industrial Workers of the World, *Preamble and Constitution*, Art. II § 1(a) (p. 9) (1946).

was enacted Congress also amended the NLRA to make it lawful for an employer to prohibit his supervisors from belonging to a union, *see* NLRA §§ 2(3), 14(a), 29 U.S.C. § 152(3), 164(a); those sections were enacted because Congress believed that granting supervisors the legal right to join a union representing rank-and-file employees "is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors" and "is inconsistent with our policy to protect the rights of employers." H.R. Rep. 245, 80th Cong. 1st Sess. at 14 (1947). Yet, the Board's reading of § 8(b)(1)(B) would transform that section into a vehicle requiring unions to remain open to workers who opt to become supervisors.

2. The Board makes no attempt to justify its far-reaching and anomalous interpretation of § 8(b)(1)(B) by reference to the language and history of that provision —the traditional sources for statutory interpretation. Instead, the Board dismisses the legislative materials as quickly as possible, *see* NLRB Br. at 8-10, and devotes the remainder of its brief to parsing this Court's decision in *ABC* in the apparent belief that *ABC* is determinative of the instant case. But as we now show, the question decided in *ABC* is analytically distinct from the question presented here, and *ABC*'s holding does not compel the conclusion for which the Board here argues. And while the *ABC* opinion does contain language that can be read to support the Board's argument, the fairer reading is that those passages were not intended to apply to, much less dictate the result in, the present context.

As the Court stated in *ABC*, although § 8(b)(1)(B) has not been amended since enacted by Congress in 1947, the "application" of that section has "continued to evolve" under successive Labor Boards. 437 U.S. at 423. In order to understand *ABC*, it is useful to begin by briefly tracing that evolution, as the Court did in *ABC* itself. *See id.* at 422-26.

"For more than 20 years after § 8(b)(1)(B) was enacted in 1947, the Board confined its application to situations clearly falling within the metes and bounds of the statutory language," *FP&L*, 417 U.S. at 798, *viz*, to cases in which "pressures [were] exerted by [a] union directly upon [an] employer to force him into a multi-employer bargaining unit or otherwise to dictate or control the choice of his representative for the purpose of collective bargaining or adjusting grievances in the course of administering an existing contract," *ABC*, 437 U.S. at 422-23. During that period no broader sweep was ever imputed to § 8(b)(1)(B).

"In 1968, however, the Board significantly expanded the reach of § 8(b)(1)(B) with its decision in *San Francisco-Oakland Mailers' Union No. 18 (Northwest Publications, Inc.)*, 172 NLRB 2173." *FP&L*, 417 U.S. at 799-800. In that case, "the Board applied the section to prohibit union discipline of one of its member-supervisors for the manner in which he had performed his supervisory task of grievance adjustment." *ABC*, 437 U.S. at 423. The Board in *Oakland Mailers* reasoned that by seeking to "compel the employer's foremen to take pro-union positions in interpreting the collective bargaining agreement," the union in that case "interfered with the [employer's] control over his representatives" and thereby "indirectly" coerced the employer to dispense with the services of the supervisor whom the employer otherwise would have desired to retain as the employer's representative. *Oakland Mailers, supra*, 172 NLRB at 2173-74.

"Subsequent Board decisions extended § 8(b)(1)(B) to proscribe union discipline" of a supervisor-member "whenever he was engaged in management or supervisory activities, even though his collective bargaining or grievance adjustment duties were not involved." *FP&L*, 417 U.S. at 800-02. "Through the course of these decisions, § 8(b)(1)(B) thus began to evolve in the view of the Board and the [lower] courts 'as a general prohibi-

tion of a union's disciplining of supervisor-members for their conduct in the course of representing the interests of the employer,' or for acts 'performed in the course of [their] management duties.' " *Id.* at 802.

In *FP&L* and *ABC* the Court confronted this understanding of § 8(b)(1)(B) in the context of cases in which supervisor-members were disciplined by their union for reporting to work during a strike against their employers. In *FP&L* the supervisor-members had reported to work to perform "rank-and-file struck work," 417 U.S. at 793; the Court concluded that the union discipline did not violate § 8(b)(1)(B) because it did not threaten to "adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer," *id.* at 804-805. But in *ABC*, in which the supervisor-members were disciplined "for crossing the union picket line during a strike and performing [their] regular supervisory duties, which included the adjustment of grievances," 437 U.S. at 413, the Court sustained the Board's conclusion that these individuals were being disciplined for their acts *qua* supervisors and that such discipline "would or might adversely affect the performance of the [supervisor-members'] grievance-adjustment duties," *id.* at 432.

The *ABC* Court distinguished *FP&L* by observing that " '[w]hen a supervisor forsakes his supervisory role to do rank-and-file work ordinarily the domain of nonsupervisory employee he is no longer acting as a management representative and no longer merits any immunity from discipline.' " *Id.* at 424. And the *ABC* Court reasoned that disciplining a union member for what he does "as a management representative" is different for two reasons: first, disciplined supervisor-members (who in *ABC* were referred to as "hyphenates") "might be tempted to give the union side of a grievance a more favorable slant while the threat of discipline remained"; and, second, in any event "the employer could not be certain that a fined

hyphenate would willingly answer the employer's call to duty during a subsequent work stoppage, particularly if it occurred in the near future." *Id.* at 435. The Court thus concluded:

> Union pressure on supervisors can affect either their willingness to serve as grievance adjusters or collective bargainers, or the manner in which they fulfill these functions; and either effect impermissibly coerces the employer in his choice of a representative. [*Id.* at 436.]

The Board bases virtually its entire argument on the words just quoted, which the Board interprets as establishing an independent rule that any union discipline which affects union members' "willingness to serve" as management's representatives violates § 8(b)(1)(B).[9] That is, admittedly, one possible reading of the quoted language. But, read fairly, the foregoing passage suggests a far narrower rule.

As previously noted, the crucial fact in *ABC* was that the "hyphenates" were "management representative[s]" and that *the union, having allowed its members to assume that status, was seeking to use the hyphenates' union membership to regulate the hyphenates' conduct as management representatives.* In other words, in *ABC* (as in *Oakland Mailers*), the union was "interfer[ing]

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[9] The Board also heavily relies on the footnote to the passage quoted in text in which the Court reviewed the reasoning of the United States Court of Appeals for the District of Columbia in *FP&L*, observing that in that case the appellate court had "noted its agreement with *New Mexico District Council of Carpenters and Joiners of America (A. S. Horner, Inc.)*, 177 NLRB 500 (1969), *enf'd*, 454 F.2d 1116 (C.A. 10, 1972)," a case which is quite similar to the instant case. *See* ABC, 437 U.S. at 436 n.36. The Board claims that the Court in *ABC* "cited that aspect of *A. S. Horner* with approval," NLRB Br. at 13, *see id.* at 16-18; we do not so read the footnote which is, in terms, limited to an explication of the reasoning of the appellate court in *FP&L*. Indeed, if that footnote were to constitute approval of *A. S. Horner*, it would, for the reasons explained in text, go considerably beyond the body of the *ABC* opinion and address an issue that was not raised in *ABC*.

with the employer's control over his representative," as the Court stated in *ABC*, 437 U.S. at 423, using almost the identical words that the Board has used in *Oakland Mailers*, 172 NLRB at 2173. It was in this context that the Court discussed what "effect[s]" are "impermissibl[e]" under § 8(b)(1)(B). So understood, the language from *ABC* on which the Board here relies can be read to mean that where a union "interfere[s] with the employer's control over his representatives" by disciplining individuals for their conduct *qua* management representatives the union's action is unlawful regardless of whether the ultimate *impact* of the discipline is to "affect [the supervisors'] willingness to serve as grievance adjustors or collective bargainers, or the manner in which they fulfill these functions." *ABC*, 437 U.S. at 436. On this reading, *ABC*—and § 8(b)(1)(B)—*would safeguard the employer's control over his representatives, but would not preclude a union from seeking to prevent its members from becoming management's representatives.*

3. The question as to what *ABC* means thus can be reformulated as follows: should *ABC* be interpreted to proscribe all union action that can be said to affect a union member's "willingness to serve" as management's representative, or should *ABC* be interpreted to proscribe only union action which "interferes with the employer's control over his representative" and *thereby* affects the representative's "willingness to serve?" Because what is at stake in the choice between these two interpretations of *ABC* is a decision as to the reach of § 8(b)(1)(B), we submit that the question is best resolved not by further parsing the words of *ABC*,[10] but by examining the language and history of the statute. One additional consideration peculiar to this case reinforces that approach.

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[10] *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979) ("the language of an opinion is not always to be parsed as though we were dealing with the language of a statute").

Although the Board's counsel here boldly argue for the first interpretation of *ABC* and of § 8(b)(1)(B), the Board's own *decisions* are far less clear and, indeed, are internally inconsistent. In particular, the Board has struggled unsuccessfully with the question whether union discipline against union members who leave rank-and-file positions to become temporary supervisors is unlawful.

In three cases—two of which predate *ABC* and the third of which was decided within a week of *ABC* (and does not cite this Court's decision)—the Board, consistent with the position championed here, answered that question in the affirmative and held the unions in those cases guilty of violating § 8(b)(1)(B) by adopting and enforcing such rules.[11] But in *National Association of Letter Carriers*, 240 NLRB 519 (1979), which was decided *after ABC*, the Board reached the opposite conclusion in a case in which a union, by constitutional amendment, denied membership status to those accepting positions as temporary supervisors and precluded such individuals from participating in the union's health-insurance plan. In holding that the adoption of that union rule was *not* unlawful, the Board reasoned:

> The fact that the Postal Service may have fewer letter carriers who are willing to serve as temporary supervisors as a result of the [union's constitutional] amendment in no way affects the Postal Service's selection of *which* letter carriers will serve as temporary supervisors. The method for selecting temporary supervisors remains completely within the control of the Postal Service. The decision to place one's name on the list of employees who are willing to serve as temporary supervisors remains completely within the power of each individual letter carrier, and the decision to rate an employee as eligible to serve as temporary supervisor remains com-

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[11] *Teamsters Local 663*, 193 NLRB 581 (1971); *Communications Workers Local 1132*, 226 NLRB 97 (1976), *enf'd*, 562 F.2d 37 (2d Cir. 1977); *Systems Council T-6*, 236 NLRB 1209 (1978), *enf'd*, 559 F.2d 5 (1st Cir. 1979).

> pletely within the power of the Postal Service. The final decision to appoint an employee as a temporary supervisor, and the final decision to accept such an appointment, remains solely within the power of the Postal Service and the employee respectively. *Nothing that the [union] has done can influence this selection procedure.* [*Id.* at 525; last emphasis added.]

In support of this conclusion, the Board cited *ABC*. *See* 240 NLRB at 525 n. 29. Thus, although the Board's theory here accords with *some* of its decisions, that theory is manifestly inconsistent with other recent NLRB precedent.[12] It is therefore particularly appropriate in this case, in order to resolve the conflict in the Board's decisions and to choose between the alternative interpretation of *ABC*, to turn to the legislative materials.

B. The Legislative Materials

So far as we can determine, in enacting § 8(b)(1)(B), Congress did not focus specifically on and reject in terms the theory the Board here seeks to extract from *ABC*, *viz.*, that § 8(b)(1)(B) prohibits all union actions that tend to reduce the size of the pool of would-be supervisors. But as we proceed to show—based on a review of the origins of § 8(b)(1)(B), its authoritative legislative explanations, and the political context in which it was enacted—that section was intended, understood and defended as a narrow prohibition addressing two precisely defined evils far removed from the Union's conduct in the instant case. The Board's attempt to expand the reach of § 8(b)(1)(B) to cover conduct of the type involved here is at war with the "gamut of values current" when that section was enacted. *Woodwork Manufacturers v. NLRB*, 386 U.S. 612, 620 (1967).

1. In order fully to understand the legislative history, some brief background is required as to the political setting in which Congress was acting. From the time the

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[12] *See also The Tribune Co.*, 226 NLRB 379 (1976).

Wagner Act was enacted in 1935, bills were introduced in every Congress to amend that Act in various respects. No bill cleared Congress until 1946, however, when the Case bill, H.R. 4908, 79th Cong., 2d Sess.—the "direct antecedent" of the LMRA, *Doud Box Co. v. Courtney*, 368 U.S. 502, 509 (1967)—was approved by Congress, 92 Cong. Rec. 5739, 5946. That bill was vetoed by President Truman, and Congress failed to override the veto. *Id.* at 6674-78.

In the 1946 elections, the Republicans gained control of both the House and the Senate; the Republicans held a 57-vote majority in the House (246-189) and a six-vote majority in the Senate (51-45).[13] Facing a "predictable presidential veto," *Pipefitters v. United States*, 407 U.S. 385, 409 (1972), and the need to develop legislation that two-thirds of the Congress would support in order to override that anticipated veto, the Eightieth Congress took up the subject of labor law revision.

2. The House Committee on Education and Labor, chaired by Representative Hartley, was the first to report out a labor law bill in 1947. That bill was sweeping in its scope; before the Act was finally passed Representative Hartley stated that "we deliberately put everything we could into the House bill." [14] As reported by the Committee—and as approved by the House with minor changes following brief debate—the Hartley bill: would have precluded any union from representing the employees of more than one "competing employer" (H.R. 3020, 80th Cong., 1st Sess. § 9(f)(1)); would have made it unlawful for employees of "competing employers" to act in concert (*id.* §§ 2(16), 12(a)(3)(A)); would have proscribed sympathy strikes (*id.* §§ 2(13), 12(a)(3)(A)), strikes (or economic pressure) over unfair labor practices

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[13] S. Bailey & H. Samuel, *Congress at Work*, 416 (1952). This was the first time since before the Wagner Act was passed that the Republicans controlled Congress. Reilly, *The Legislative History of the Taft-Hartley Act*, 29 G.W.L.Rev. 285, 289 (1966).

[14] *New York Times*, May 30, 1947.

(*id.* § 12(A)(B)), informational or labor-standards picketing (*id.* § 12(a)(2)), and strikes (or economic pressures) aimed at work preservation (*id.* §§ 2(17), 12(a)(3)(B)) or at obtaining recognition for a majority-representative as the exclusive representative (*id.* § 12(a)(3)(C)(i)); and would have required, as a condition of any strike, a government-conducted election in which an absolute majority of the bargaining unit voted to strike (*id.* § 2(11)(B)(vi)). As to most of these practices, unions which committed wrongs would have been subject to private damage actions (*see id.* § 12(b)) and to injunctions, notwithstanding the provisions of the Norris-LaGuardia Act (*see id.* § 12(c)).[15]

The House Committee stated the philosophy animating its bill as follows:

> For the past 14 years, as a result of labor laws ill-conceived and disastrously executed, the American workingman has been deprived of his dignity as an individual . . . [H]is mind, his soul, and his very life have been subject to a tyranny more despotic than one could think possible in a free country.
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> The employer's plight has likewise not been happy. He has witnessed the productive efficiency in his plants sink to alarmingly low levels. He has been required to employ or reinstate individuals who have destroyed his property and assaulted other employees. . . . He has seen the loyalty of his supervisors undermined by the compulsory unionism imposed upon them by the National Labor Relations Board. He has been required by law to bargain over matters to which it was economically impossible for him to accede, and when he refused to accede he has been accused of failing to bargain in good faith. He has been compelled to bargain with the same union that

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[15] The text of H.R. 3020 as reported by the House Committee and as approved by the House is reprinted in National Labor Relations Board, *Legislative History of the Labor Management Relations Act of 1947*, at 31-98, 158-225 (hereinafter "Leg. Hist. at ——").

> bargains with his competitors and thus to reveal to his competitors the secrets of his business. He has had to stand helplessly by while employees desiring to enter his plant to work have been obstructed by violence, mass picketing, and general rowdyism. He has had to stand mute while irresponsible detractors slandered, abused, and vilified him.
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> This sordid story was unfolded before the committee in its hearings. Those hearings demonstrate the need for action by Congress—and action now. [H.R. Rep. No. 245, 80th Cong., 1st Sess. 4-5 (1947), *reprinted in* 1 Leg. Hist. at 295-96.]

In this context, what is most significant about the Hartley bill is that *it did not include any analogue to what is now § 8(b)(1)(B)*. That bill provided employers absolute protection from being pressured into joining a multi-employer bargaining unit by outlawing multi-employer bargaining, and the bill gave employers absolute control over their supervisors by removing supervisors from the definition of "employees" (*see* H.R. 3020, *supra*, § 2(3)). But having done that much, no one in the House apparently deemed it necessary to further protect employers in selecting their representatives.[16]

3. While the House was developing the Hartley bill, the Senate Committee on Labor and Public Welfare was also at work. At the start of the Eightieth Congress, Senator Ball, a member of that Committee, introduced

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[16] The House bill did include a section aimed at regulating the internal affairs of unions in order to promote "democracy in unions" and to give union members "greater control of the union's affairs." H.R. Rep. No. 245, *supra*, at 7, 1 Leg. Hist. at 298. That section, while "recogniz[ing] the right of the union to maintain discipline in the ranks and to expel members who are disloyal to the union," *id.*, contained some limitations on the grounds on which union discipline could be imposed. There is no suggestion in the legislative history that these limitations were intended to protect employers from "indirect coercion" resulting from union discipline of supervisors who also are union members.

four bills [17] drafted by Gerard Reilly, whom the Labor Committee later hired as its Special Counsel for that purpose.[18] Those bills became the subject of extensive hearings in the Senate Committee and the source of much of what was eventually enacted in the LMRA.

The Ball bills were, in many respects, similar to the bill Representative Hartley developed. Of particular relevance here, one of the Ball bills would have made it unlawful for a union to represent the employees of more than one competing employer, or to act in concert with a union representing employees of a competing employer; such a prohibition, of course, would have spelled the end of multi-employer bargaining. *See* S. 133, *supra*. Another Ball bill would have removed supervisors from the protection of the NLRA. S. 360, *supra*, §§ 2, 10. Senator Ball also proposed a section prohibiting unions from restraining or coercing employees in the exercise of their § 7 rights, *see* S. 360, *supra*, § 5; that proposal eventually was adopted, in somewhat modified form, as § 8(b)(1)(A). But none of the Ball bills contained any provision analogous to what eventually was enacted as § 8(b)(1)(B).[19]

Thus, unlike most other provisions of the LMRA, § 8(b)(1)(B) did not have its genesis in either the Hartley bill or in the Ball bills. Rather, that section can be traced to two bills introduced towards the close of that Committee's hearings by Senators Morse and Ives, two Republican

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[17] S. 55, S. 105, S. 133, S. 360, 80th Cong., 1st Sess. (1947).

[18] Reilly, *supra*, n.13 at 289-290, 294 n.14.

[19] In addition to the provisions noted in text, the Ball bills also would have outlawed all forms of union security agreements, *see* S. 133, *supra*; modified the Norris-LaGuardia Act so as to permit injunctions against various types of strikes or other concerted economic activity, including unfair labor practice strikes, recognitional strikes, and secondary boycotts, *see* S. 360, *supra*, § 10; S. 55, *supra*, § 204; and would have provided an action for treble damages with respect to secondary boycotts, S. 55, *supra*, § 204(d).

members of that Committee whose views on labor legislation were markedly more temperate than those of Representative Hartley or Senator Ball. *See* S. 858, 80th Cong., 1st Sess.; S. 871, 80th Cong., 1st Sess. (Sen. Ives).[20] Those bills were quite brief and provided for only the most modest of changes in the Wagner Act; neither bill addressed most of the subjects that eventually were dealt with in the LMRA. In particular, neither bill removed supervisors from the definition of employee, and neither bill in any way interfered with the ability of unions to organize on an industry-wide basis, or to engage in multi-employer or multi-plant bargaining. Instead each bill contained a provision—from which § 8(b)(1)(B) eventually was derived—making it an unfair labor practice for a union to coerce an employer in the selection of his bargaining representative.

Following the close of its hearings, Senator Taft, the Chairman of the Labor Committee, prepared a bill in the form of a "tentative committee print" for use by the Committee in its mark-up sessions. That bill incorpo-

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[20] Senator Morse was one of 29 Senators who had voted against the Case bill in 1946. 92 Cong. Rec. 5739. Senator Morse eventually joined only two other Republicans in voting against the bill that became the LMRA, *see* Reilly, *supra*, n.13 at 298, and he played a leading role in seeking to prevent President Truman's veto from being overridden, *see id.* at 300; *see also* S. Bailey & H. Samuel, *supra* n.13, at 438-40; R. Lee, *Truman and Taft-Hartley* at 101 (1966).

Senator Ives was elected to the Senate in 1946 with the support of the American Federation of Labor, *see New York Times*, April 16, 1947, p. 22; while running for office he had opposed the Case bill, Reilly, *supra* n.13, at 293, and had campaigned on a platform opposing any "change in the law affecting industry and labor relations," *New York Times*, Oct. 22, 1946, p. 22; Oct. 26, 1946, p. 18. Ives was offered a position on the Labor Committee in part because he represented a different wing of the party than Senators Taft and Ball; Governor Dewey had urged Senator Ives not to accept a position on the Labor Committee because Ives was "too far to the left to meet the position the Republican party will assume." *New York Times*, April 30, 1947, p. 18.

rated a variant of Senator Ball's proposal to prohibit multi-employer bargaining, and also included a modified version of the proposal of Senators Morse and Ives to prohibit unions from coercing employers in selecting their bargaining representatives. An analysis of the tentative committee print that was distributed to the committee members explained the purpose of this latter provision as follows:

> This would mean that labor organizations could no longer strike against an individual employer in order to force him to bargain through an employer's association. It would also bar strikes by a union to enforce a demand that an employer fire a personnel director or a foreman regarded as obnoxious. [Analysis of Tentative Committee Print of April 7, 1947, 80th Cong., 1st Sess. at 4.]

By a vote of 7-6, the Labor Committee decided *not* to include the Ball proposal with respect to multi-employer bargaining in the Committee's bill;[21] Senators Morse and Ives led the opposition to inclusion of that proposal (as well as to three other proposals that were drawn from Senator Ball's bills and were included in Senator Taft's "tentative committee print").[22] The Committee did agree to include in its bill a variant of § 8(b)(1)(B), derived

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[21] *See* S. Rep. No. 105, Pt. 1, 80th Cong., 1st Sess. at 50, 51-52 (1947) (Supplemental views of Senators Taft, Ball, et al.).

[22] *See, Reilly, supra* n.13, at 295; S. Bailey & H. Samuel, *supra* n.13, at 427; H. Millis & E. Brown, *From the Wagner Act to the Taft-Hartley Act* at 375 (1950).

The other three proposals from the Ball bills that were defeated in committee were: (1) a proposal to make it an unfair labor practice for a union to interfere, restrain or coerce employees in the exercise of the rights guaranteed in section 7; (2) a proposal to regulate welfare funds; and (3) a proposal to authorize damage and injunctive actions against secondary boycotts and jurisdictional strikes. *See* S. Rep. No. 105, Pt. 1, *supra*, at 50-56 (supplemental views of Senators Taft, Ball, *et al.*) The fate of those proposals on the floor of the Senate is discussed *infra* at 24.

from the Morse and Ives bills. Following the explanation of that section in the analysis of the tentative committee print, the Committee's Report explained the import of that language as follows:

> This proscribes unions and their agents from interfering with, restraining, or coercing employers in the selection of their representatives for the purposes of collective bargaining or the settlement of grievances. Thus, a union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members; also this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegate the function of settling grievances. [S. Rep. No. 105, Pt. 1, 80th Cong., 1st Sess. 21 (1947), *reprinted in* 1 Leg. Hist. at 427.] [23]

Notwithstanding the fact that the Senate Committee bill did not contain any of the most controversial features of the Ball (or Hartley) bills, three Democratic members of the Labor Committee filed a lengthy and blistering dissent from the Committee's Report. *See* S. Rep. No. 105, *supra*, Part 2, *reprinted in* 1 Leg. Hist. 463-504. These dissenters objected to most provisions of the Committee's bill including, *e.g.*, the prohibition on closed shops, *see id.* at 8-10; the provision authorizing the NLRB to conduct decertification elections, *id.* at 11-12; the provision authorizing suits to enforce collective bargaining agreements, *id.* at 13-15; the prohibition on secondary boycotts, *id.* at 19-21; and the exclusion of supervisors from the Act, *id.* at 39-40. Significantly, however, the minority report did *not* view § 8(b)(1)(B) as objectionable; the minority stated "We agree that it should be made an unfair labor practice for a union to interfere with an

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[23] The text of S. 1126 as reported by the Senate Labor Committee is reprinted in 1 Leg. Hist. at 99-157.

employer in the designation of his representatives, as provided by § 8(b)(1)(B)." S. Rep. No. 105, Pt. 2, *supra*, at 41. This was the *only* union unfair labor practice contained in the committee bill with which the minority agreed.

4. The Senate debated the Labor Committee's bill for three weeks. In the course of those debates, Senator Taft explained the approach his Committee had followed in developing its bill:

> We took each of the abuses which were testified to in the evidence and tried to find a remedial provision which could finally become enacted into law. When we got through, eleven members of the committee signed the report, including Senators who hold different views from myself, such as the Senator from Oregon [Sen. Morse]. [2 Leg. Hist. at 1520.]

Against this general background, Senator Taft outlined the intent of § 8(b)(1)(B) by delineating the "abuses" to which it was addressed. Acknowledging that the section "*is not perhaps of tremendous importance*," Senator Taft explained, as had the Committee Report, that under § 8(b)(1)(B)

> employees cannot say to their employer "We do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y." That has been done. It would prevent their saying to the employer, "You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work." This is the only section in the bill which has any relation to nationwide bargaining. Under this provision it would be impossible for a union to say to a company, "We will not bargain with you unless you appoint your national employer's association as your agent so that we can bargain nationally." Under the bill, the employer has a right to say, "No, I will not join in national bargaining. Here is my representative, and this is the man you have to deal with." I believe the provision is a necessary one,

> and one which will accomplish substantially wise purposes. [2 *Id.* at 1012.]

Later in the debates, Senator Taft echoed this theme stating:

> The union cannot say to an employer, "We will deal with you only if you designate your employers' association as the bargaining agent." The union cannot coerce an employer to join an employers' association. . . . That has a rather indirect effect on nationwide bargaining. [2 *Id.* at 1241.]

And Senator Ellender, a Democratic member of the Labor Committee added:

> Other abuses exist, such as strikes over questions relating to invasion of management prerogatives. It often happens that management is forced to replace a foreman because the union does not like him—because he is too strict. Cases of that nature are very numerous. . . . The bill outlaws such conduct.
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> The bill prevents a union from dictating to an employer on the question of bargaining with union representatives through an employer association. The bill in subsection 8(b)(1)(B) . . . makes it an unfair labor practice for a union to attempt to coerce an employer in the selection of a personnel director or foreman, or other supervisory official. Senators who heard me discuss the issue early in the afternoon will recall that quite a few unions forced employers to change foremen. They have been taking it upon themselves to say that management should not appoint any representative who is strict with the membership of the union. This amendment seeks to prescribe a remedy in order to prevent such interferences. [2 *Id.* at 1066, 1077.]

These are the *only* explanations in the Senate debates of the reach of § 8(b)(1)(B); the section was not otherwise discussed as it was acceptable to all parties. Senator

Murray, the leader of the Democratic opposition stated, "we find no disagreement with the provisions prohibiting coercion of employers in their choice of collective bargaining representatives." 2 Leg. Hist. at 1454. Indeed, Murray included § 8(b)(1)(B) in the Democratic alternative bill which he offered towards the close of the Senate debates. 2 Leg. Hist. at 1439, 1443. Senator Ball described that bill as "made up of all the completely innocuous provisions of [the Committee's] bill, and nothing else." 2 *Id.* at 1499.

Although there were no further discussions of § 8(b)(1)(B) in the Senate, additional insight into its meaning can be gleaned from the debate that took place over the addition of subsection (A) to § 8(b)(1). As reported, § 8(b)(1) was not divided into subsections; it prohibited only "interfere[nce], restrain[t], or coerc[ion]" of an employer in the selection of his representative for the purposes of collective bargaining or the adjustment of grievances. On the floor of the Senate, Senator Ball proposed to add a subsection to § 8(b)(1) to provide employees in the exercise of their § 7 rights the same protection being afforded by the proposed § 8(b)(1) to employers in the selection of their representatives. 2 Leg. Hist. at 1018. That proposal, which had been defeated in the Labor Committee by a vote of 7-6, *see* n. 22, *supra*, generated lengthy debate.

Senator Ives led the initial opposition to the Ball amendment. He expressed concern over "the tremendous possibilities for abuse that [would] exist" if such a prohibition were enacted, arguing that if adopted the Ball amendment "inevitably will serve not alone to discourage legitimate labor organizations, but may later, by interpretation and effect, defeat legitimate attempts at labor organization." 2 *Id.* at 1024-25. But Senator Ball and his supporters provided repeated reassurances that they understood the words "interfere, restrain or coerce"—the words that defined the prohibition for both proposed sub-

sections of § 8(b)(1)—to address only "threats of violence or of reprisal and that sort of thing," 2 *id.* at 1202 (Sen. Ball), and not to "interfere with the internal affairs or organization of unions," 2 *id.* at 1141 (Sen. Ball). *See also* 2 *Id.* at 1200 (Sen. Ball) ("we are not trying to interfere with the internal affairs of a union which is already organized"). And to assure that his amendment would not be overbroad in its reach, Senator Ball accepted a modification proposed by Senator Ives to delete the word "interfere" from § 8(b)(1) so that the violation for either subsection would be limited to acts of "restraint" or "coercion". Senator Ball acknowledged that "interfere" is "very vague," 2 *id.* at 1139, and Senator Taft, in urging Senator Ball to accept the Ives proposal, stated that the original language "is perhaps somewhat broad," *id.* With this modification the Ball amendment was endorsed by Senator Ives, and was overwhelmingly approved by the Senate. *See* 2 *Id.* at 1217 (adopting Ball amendment by vote of 60-28).[24]

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[24] Senator Ives played an equally critical role with respect to several other amendments which had been rejected by the Labor Committee and were offered by Senator Ball on the floor of the Senate. *See* n.22, *supra*.

The Ball proposal to limit multi-employer bargaining was defeated by one vote, 2 Leg. Hist. at 1302, with Senator Ives leading the opposition, *see* 2 *id.* at 1246-50, 1253-54, 1271-84. (Although Senator Taft supported that proposal, he joined in preventing the vote from being reconsidered even though the vote of absentee Senators could have altered the outcome; Senator Taft feared that if this amendment were adopted the bill would not generate sufficient support to overcome the anticipated veto. S. Bailey & H. Samuel, *supra* n.13, at 431-32.)

Senator Ives also successfully opposed the Ball amendment to authorize injunctive and damage actions with respect to secondary boycotts, *see* 2 Leg. Hist. at 1323-24, 1356-57, 1370, and then worked with Senator Taft to develop an alternative amendment providing only for damage actions, which amendment was overwhelmingly approved by the Senate, *see* 2 *id.* 1356-57, 1370-71, 1400.

[Continued]

As thus amended, the Senate Committee's bill passed the Senate by a vote of 68-24. 2 *Id.* at 1522.

5. The House and Senate appointed conferees to resolve the differences between their respective bills; although only a freshman, Senator Ives was appointed as a conferee (ahead of several more senior colleagues) "because it was felt that his views would carry weight with the newly-elected Republican Senators" whose support would be critical to override the anticipated veto.[25] In conference, the House "receded on virtually all the important provisions," in an effort to secure passage of a veto-proof bill;[26] Representative Hartley acknowledged as much in presenting the conference report to the House, *see* 1 Leg. Hist. at 882, 883-884. The conference report was approved by both Houses by wide majorities. 1 *Id.* at 899-900 House vote of 320-79); 2 *Id.* at 1620-21 (Senate vote of 54-17).

As anticipated, President Truman vetoed the Taft-Hartley bill. The House easily overrode that veto by a vote of 331-83. 1 *Id.* at 922-23. In the Senate, however, it was "generally known" that "two Democrats who had voted for the conference report would shift out of loy-

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[24] [Continued]

Only one amendment of Senator Ball's was adopted over Senator Ives' opposition: the amendment regulating welfare funds. *See* 2 *Id.* 1302-03, 1314-15, 1323.

Senator Morse also opposed each of the Ball amendments and, unlike Senator Ives, did not agree to the compromises that were negotiated on two of those amendments. *See* 2 *Id.* at 1182-97, 1357-64. The adoption of these compromises, plus the Ball amendment pertaining to welfare funds (which Senator Morse also opposed, 2 *id.* at 1317-20) led Senator Morse to oppose final passage of the bill, even though he had voted in favor of reporting the Committee's bill.

[25] Reilly, *supra* n.13, at 298.

[26] S. Bailey & H. Samuel, *supra* n.13, at 434. *See also* Reilly, *supra* n.13, at 298-99; H. Millis & E. Brown, *supra* n.22, at 384-85.

alty to the Administration" and that opponents of the bill needed "to gain [only] three more votes." [27] The opponents conducted a brief filibuster in the hopes of securing those votes; as part of the filibuster, Senator Morse held the floor from 6:30 a.m. until late in the afternoon of the second day of the debate.[28] No additional Senators changed their positions, however, and the Taft-Hartley bill was enacted into law.

6. One year after the LMRA was enacted, the Democrats regained control of both the House and the Senate, and an attempt was made to repeal that law. Although nothing ultimately came of that effort, the record of that effort provides yet additional insight into the contemporaneous understanding of § 8(b)(1)(B).

Within a few months after the Eighty-First Congress convened, the Senate Labor Committee reported out a bill to repeal the LMRA. *See* S. Rep. No. 99, Pt. 1, 81st Cong., 1st Sess. (1949). Senator Taft, who was then the ranking minority member of that Committee, opposed the bill and in his minority report propounded a series of amendments to the Committee's bill which would have reenacted most of the LMRA; among the provisions he proposed to reenact was § 8(b)(1)(B). He explained the point of that section in precisely the same terms as he had used when the section was enacted two years earlier:

> The typical situation to which this provision would apply is illustrated by the case of the Southern Coal Producers and the United Mine Workers Union . . . The miners' union refused to recognize the association or its president . . . as the representative of the operator members. [S. Rep. No. 99, *supra*, Pt. 2 at 25.]

Again, no other purpose was attributed to § 8(b)(1)(B).

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[27] Reilly, *supra* n.13, at 300.

[28] S. Bailey & H. Samuel, *supra* n.13, at 439.

C. The Lessons

Against this background, we return to the question: should § 8(b)(1)(B) and *ABC* be understood to prohibit all union conduct which tends to affect the willingness of union members to serve as management's representatives, or should § 8(b)(1)(B) and *ABC* be read more narrowly to proscribe union conduct which interferes with an employer's control over his representatives. For two reasons, we submit, the materials just reviewed compel the narrower reading.

First, the authoritative explanations of § 8(b)(1)(B) in the legislative history—from the first statement in the analysis of the Senate Committee's tentative print to Senator Taft's explanation in 1949 in the course of a consideration of a bill to repeal the LMRA—clearly and consistently define the purposes of that section in narrow terms and contain no hint of any congressional intent to go so far as to prohibit unions from enforcing rules against union members working as supervisors generally, or as supervisors for non-union employers. Rather, § 8(b)(1)(B) was described time and again as a narrow provision addressed to two specific and identified evils: union actions forcing employers into multi-employer bargaining units or forcing employers to hire or fire a particular individual as a supervisor. No other purpose was ever suggested for § 8(b)(1)(B).

Second, the political context in which the section was enacted makes clear that there was not some broader, unspoken intent underlying the section. The fact that the section originated with Senators Morse and Ives, and not Senator Ball or Representative Hartley, is probative of the limited reach intended for § 8(b)(1)(B). Moreover, the section was included in the Senate Labor Committee's bill whose content was determined by the more moderate members of the Committee, and it was that Committee's substitute for a more severe limitation on multi-employer bargaining. Indeed, even Senator Murray

and the other opponents of the Committee bill endorsed this provision, while Senator Taft described the section as "not perhaps of tremendous importance," and Senator Ball referred to it as one of the "innocuous" provisions of the bill. And on the floor of the Senate the provision was watered-down further by deleting the prohibition on acts of "interference" (as distinguished from acts of "restraint" or "coercion"). Against this background, it is simply inconceivable that § 8(b)(1)(B) was understood or intended by anyone in Congress to go beyond the limited statement of its purpose.

We recognize, of course, that the legislative materials just reviewed, and the analysis of those materials set forth above, not only compel rejection of the Board's argument in the instant case but also call into question *Oakland Mailers* as well. It is, indeed, our view that the ultimate lesson to be drawn from these materials, is that the Board's understanding of § 8(b)(1)(B) for the first two decades after that section was enacted—that the section "prohibit[s] only direct union pressure designed to compel an employer to replace its chosen representative," NLRB Br. at 10, and not the so-called "indirect coercion" supposedly resulting from union discipline of union members—is the correct understanding.[29] And it is noteworthy in this regard that the Board in *Oakland Mailers* did not treat with any of the legislative materials.

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[29] The fact that the Board so interpreted the statute shortly after it was enacted, and adhered to that interpretaion for two decades, is itself probative. *See, e.g., Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933) (the "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new" is entitled to "peculiar weight"); *Federal Trade Commission v. Bunte Brothers, Inc.*, 312 U.S. 349, 351-52 (1941) ("the want of assertion of power by those who presumably would be alert to exercise it is . . . significant in determining whether such power was actually conferred").

That conclusion is buttressed by the statutory text. Section 8(b)(1)(B), in terms, makes it an unfair labor practice for a union to "restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." That language naturally suggests a prohibition on direct pressure on employers with respect to the employer's choice of a representative; it strains the statutory words to the breaking point to find a prohibition on union discipline of supervisor-members. Although such discipline may affect a member's willingness to serve as a supervisor or an employer's willingness to hire the member as a supervisor, such union discipline still leaves the employer with a free choice as to whom to hire as his representative. And, it is that choice that § 8(b)(1)(B) safeguards from union pressure or reprisals.

Notwithstanding the foregoing considerations, in *ABC* the Court stated that it was "not prepared at this juncture to override" the Board's conclusion in *Oakland Mailers*. 437 U.S. at 437. We do not urge the Court to revisit that decision here. As we have seen, the theory the Board propounds in the instant case represents yet a further extension of *Oakland Mailers*, one not compelled by the decisions to this point. *See* pp. 13-16, *supra*. In this context, the words of Chief Justice Burger, speaking for the Court in *United States v. 12 200-Ft. Reels of Films*, 413 U.S. 123, 127 (1973), are especially apt:

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the "line drawing" familiar in the judicial, as in the legislative process: "thus far but not beyond."

The legislative materials provide a wholly rational basis for drawing such a line at *Oakland Mailers* and not allow-

ing the the doctrine to be extended to cover cases in which a union seeks only to prevent its members from assuming supervisory positions. The core concern underlying *Oakland Mailers* and underlying what we propose as the preferred interpretation of *ABC*—that supervisors should not be subject to union control for the manner in which they perform their supervisory responsibilities—is at least a concern shared by the Congress that enacted the LMRA, albeit not one that § 8(b)(1)(B) was designed to address.[30] But *Oakland Mailers* fully vindicates that concern by proscribing union conduct that interferes with an employer's control over his representatives.

The extension of *Oakland Mailers* that the Board here champions is *not* justified by the interest in protecting employers from supervisors with divided loyalties. Rather, the value underlying the Board's decision in the instant case is quite different: protecting employers from any diminution in the size of the pool from which they hire their supervisors, thereby assuring employers the ability to hire as management representatives persons who are union members.

There is not one iota of evidence in the statutory materials to suggest that Congress shared *that* value or that Congress sought to preclude unions from inducing their

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[30] As the Court explained in *FP&L*, "it is clear that the conflict-of-loyalties problem that the Board has sought to reach under § 8(b)(1)(B) was intended by Congress to be dealt with in a very different manner." 417 U.S. at 811. "Congress' solution" was to exclude supervisors from the coverage of the Act, so that the employer would be "at liberty to demand absolute loyalty from his supervisory personnel by insisting, on pain of discharge, that they neither participate in, nor retain membership in, a labor union." *Id.* at 812. "[I]t is quite apparent, given the statutory language and the particular concerns that the legislative history shows were what motivated Congress to enact § 8(b)(1)(B), that it did not intend to make *that* provision any part of the solution of the generalized problem of supervisor-member conflict of loyalties." *Id.* at 813 (emphasis in original).

members not to enter the pool of would-be-supervisors. To the contrary, the legislative materials are replete with evidence of Congress' reluctance to intrude into internal union affairs in the manner the Board's theory in this case requires.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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